DOCUMENT RESUME

ED 211 653 UD 022 047

AUTHOR Arrington, Karen McGill; And Others
TITLE With All Deliberate Speed: 1954-19?? United States Commission on Civil Rights Clearinghouse Publication 69.
INSTITUTION Commission on Civil Rights, Washington, D.C.
PUB DATE Nov 81
NOTE 51p.; Some footnotes may be marginally legible due to reproduction quality of original document.

EDRS PRICE MF01/PC03 plus Postage.
DESCRIPTORS Administrator Role; Busing; Community Role; Desegregation Effects; *Desegregation Litigation; Desegregation Plans; Educational Policy; Equal Education; *Federal Legislation; Government Role; *School Desegregation; *State Courts; *State School District Relationship; Transfer Students
IDENTIFIERS *Brown V Board of Education; *Supreme Court

ABSTRACT

This monograph reviews the history and examines the current status of school desegregation with respect to major court decisions and their impact on educational policy. Discussed are the Brown v. Board of Education case of 1954 and subsequent Supreme Court and lower court decisions, busing, involvement of the executive and legislative branches of government, and the need for metropolitan desegregation plans. It is also stated that there is a need for a greater commitment and leadership at the State and local levels in support of Federally initiated efforts to correct the past injustices of a "separate but equal" system. (JCD)

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With All Deliberate Speed: 1954–197?

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U D022047

United States Commission on Civil Rights
Clearinghouse Publication 69

November 1981

ACKNOWLEDGMENTS

This monograph was written by Karen McGill Arrington. The project was carried out under the supervision of Ronald Henderson, Division Chief, and the overall supervision of Caroline Davis Gleiter, Assistant Staff Director, Office of Program and Policy Review. The staff is indebted to the entire support staff of the Office of Program and Policy Review.
Vivian Hauser, Audree Holton, and Vivian Washington, Publications Support Center, Office of Management, were responsible for final preparation for publication.

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Introduction

The U.S. Commission on Civil Rights believes that school desegregation is the single most important task confronting the Nation today in the field of civil rights. Any retreat in our efforts to achieve this goal will seriously harm our efforts to move forward in other civil rights areas. Further, the Commission strongly believes that progress in desegregating our Nation's schools will not be achieved without the clear support and leadership of government officials at the national, State, and local levels. The Commission appeals to those in positions of responsibility to make such a commitment. There is no middle ground. Either we are for desegregation and a system of education that provides equality of opportunity, or we are for a system of education that makes a mockery of our Constitution.

The commitment that must be made today so that children may be educated in environments where they will come to know one another as human beings and to learn that all people are truly created equal may require sacrifice on our part. But as the Supreme Court wrote in 1971:

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot

be avoided in the interim period when remedial adjustments are being made to eliminate the dual system. . . .[1]

A commitment to school desegregation will move our Nation closer to a Nation of one people.

[1] 402 U.S. at 31 (1971).

The History of Separate But Equal

Although the story of school desegregation could begin with the first blacks brought to these shores at Jamestown, Virginia, in 1619, this chronicle will begin at the end of the Civil War. The end of the Civil War and the Emancipation Proclamation brought hope to blacks that they would begin to enjoy the fruits and rewards of freedom, previously denied them.[2] Hope was further heightened when the 13th amendment, proposed in February 1865 and ratified on December 18, 1865, officially terminated slavery in the United States.[3] Blacks believed that the amendment would end the debate over slavery. Black hope and optimism were short lived as the Southern States quickly enacted the infamous Black Codes that substantially restricted the newly gained freedom of ex-slaves.[4]

The Black Codes differed from State to State. Provisions of various codes resulted in blacks not being allowed to enter a town without a permit, to own firearms, to purchase land within city limits, or to purchase liquor. Blacks could serve as witnesses in court only against other blacks and often had to adhere to curfews.[5]

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[2] U.S., Commission on Civil Rights *Twenty Years After Brown* (1974), p. 10 (hereafter cited as *Twenty Years After Brown);* Bernard Schwartz, *Statutory History of the United States: Civil Rights* (New York: McGraw-Hill, 1970), vol. 1, p. 19. It should be noted that it was prohibited in many States to teach a slave to read or write. "So apprehensive were members of the Slavocracy about the great mischief that literacy might stir that in many States it was illegal to teach free as well as enslaved Negroes." Richard Kluger, *Simple Justice* (New York: Vintage Books, 1977), p. 28.

[3] Ibid.

[4] *Twenty Years After Brown,* p. 11; Laughlin McDonald "The Legal Barriers Crumble," in *Just Schools* (Institute for Southern Studies, May 1979), p. 20 (hereafter cited as *The Legal Barriers Crumble).*

[5] *Twenty Years After Brown,* p. 11.

Thirty-one years after slavery was abolished, the South's movement into two separate societies—one black, one white—was to be sanctioned by the Supreme Court of the United States in *Plessy v. Ferguson.* [6] This decision was in response to a Louisiana law passed in 1890:

> requiring railway companies carrying passengers in their coaches, to provide equal but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations; and providing that no person shall be permitted to occupy seats in coaches other than the ones assigned to them, on account of the race they belong to. . . .[7]

The Court rejected the argument of Plessy, the black plaintiff, that to be forced to ride in separate railroad cars stamped him with a "badge of inferiority." In disagreeing with Plessy, the Court upheld the doctrine of separate but equal:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[8]

The "separate but equal" doctrine emerged in "Jim Crow" laws across the South.[9] Laws were enacted that required the separation of blacks and whites in almost every realm of life: in schools, housing, jobs, public accommodations, cemeteries, hospitals, and labor unions. In courts of law, separate Bibles were used for white and black witnesses. In public places, white and "colored" signs dictated which restrooms or water fountains were to be used. Blacks were allowed in public parks only on "Colored Day." Blacks were forced to sit in the rear of streetcars and buses. In restaurants, blacks could buy food only by entering a back door and then leaving to eat outside.[10]

Racial separation of blacks and whites in public education had long been institutionalized throughout the United States, in both the North and the South. In fact, a case relied upon in *Plessy v. Ferguson* [11] was *Roberts v. City of Boston,* [12] which had upheld public school racial segregation. Undergirded by the doctrine of separate but equal, enunciated in *Plessy,* segregated education became the status quo. By the turn of the century, segregation by either school or classroom was widespread for other persons of color as

[6] 163 U.S. 537 (1896).
[7] *Id.* at 537, 538.
[8] *Id.* at 551.
[9] *Twenty Years After Brown,* p. 14.
[10] Ibid.
[11] 163 U.S. 537 (1896).
[12] 59 Mass. (5 Cush 198) (1850). The Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them and to prohibit their attendance at the other schools. 163 U.S. at 544.

well. For example, some parts of Texas maintained three separate systems: for Anglos, Mexican Americans, and blacks.[13] This segregation was to continue well into the 20th century, and in 1946 evidence was presented in *Mendez v. Westminister* [14] to show that in certain California school districts children of Mexican or Latin descent were segregated and required to attend schools reserved for and attended solely and exclusively by children of Hispanic origin. Although the school district contended that the segregation was due to a language deficiency, none of the students had been tested for language proficiency and school assignments were made on the basis of Hispanic-sounding last names.[15] As late as 1950 separate educational facilities were required for black and white students in 21 States and in the District of Columbia.[16]

During these years the "equal" aspect of the doctrine was overshadowed by the "separate" aspect:

> In 1915. . .white students in South Carolina went to school 133 days a year, blacks only 67. The pupil-teacher ratio was 36 to 1 for whites but 64 to 1 for blacks. White teachers made more than twice as much as black teachers, while the State spent $16.22 to teach each white child but only $1.13 for each black child.[17]

The disparity between expenditures for black and white schools in 1930 clearly demonstrates the fallacy of "separate but equal." Alabama, Florida, Georgia, and Mississippi were spending five times as much on the education of every white child as on every black child. Maryland, North Carolina, Oklahoma, Texas, and Virginia were spending twice as much.[18]

Moreover, it has been estimated that as late as 1930 one million black youths of high school age (primarily in the South) were not attending school. Approximately 50 percent were out of school because their local governments did not provide high schools for blacks.[19]

Disparities in educational resources were to continue well into the 20th century for blacks and other persons of color. For example, a Commission study of nine school districts in the San Antonio area showed that in the northeast districts (predominantly white), expenditures per pupil from all revenue sources in the 1967–68 school year amounted to $745. In the Edgewood school districts (predominantly Mexican American), expenditures per pupil amounted to $465.[20] The report also showed that 98 percent of the noncollege-degree teachers employed in the nine San Antonio

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[13] U.S., Commission on Civil Rights, *The Mexican American* (1968), p. 9.
[14] 64 F. Supp. 544 (1946); 161 F.2d 744 (1947).
[15] Kluger, *Simple Justice*, p. 399.
[16] *The Legal Barriers Crumble*, pp. 22–23.
[17] Harold W. Horowitz and Kenneth L. Karst, *Law, Lawyers and Social Change* (Indianapolis: Bobbs-Merrill, 1969), p. 162, as reported in *The Legal Barriers Crumble*, p. 23.
[18] Kluger, *Simple Justice*, p. 134.
[19] Ambrose Caliver and J.H. Douglas, "Education of Negroes: Some Factors, Relating to its Quality," *School Life*, vol. XXXVI (1954), pp. 142–43, as reported in Leon Jones, "School Desegregation in Retrospect and Prospect," *The Journal of Negro Education*, vol. XLVII (Winter 1978), no. 1, p. 46.
[20] U.S., Commission on Civil Rights, *Stranger in One's Land* (May 1970), p. 24.

districts were concentrated in the predominantly Mexican American districts.[21]

At Commission hearings on school desegregation, witnesses have discussed the disparities that existed in educational resources available to black and white students. These disparities, in many instances, were eliminated only after school districts were forced to desegregate. For example, a black high school principal testifying in Tampa, Florida, stated that his budget had improved 300 percent since school desegregation.[22] Similarly, an English teacher reported tremendous gains in staffing, pupil personnel services, and school building facilities since school desegregation.[23] A black student testified that after school desegregation she attended a school where students had their own desks and books. Previously, she had attended a school with broken desks where three students often had to share one book. She also discussed the improvements that were made at the all-black school she had attended: Grass was planted, the windows were repaired, and a new basketball court was constructed. The student stated that before school desegregation every other window was broken and in the winter "if you weren't prepared. . .you would freeze."[24]

Questioning by the Supreme Court

During the 1930s and the 1940s, the National Association for the Advancement of Colored People (NAACP)[25] began to carry out a legal strategy that had been fashioned in the late 1920s.[26] The decision was made to "boldly challenge the constitutional validity of segregation if and when accompanied irremediably by discrimination [so as to] strike directly at the most prolific sources of discrimination."[27] The strategy was to begin the legal challenge to segregation by confronting education in graduate and professional schools, since blatantly discriminatory and unequal school systems produced by segregation were most obvious at this level.[28] The NAACP also thought that to begin to address discrimination in legal education might be especially productive, since the judges who would rule on the cases were intimately familiar with the training required to produce a lawyer.[29] Between 1938 and 1950, four major cases brought by the NAACP reached the Supreme Court of the United States. The Court began to question the "equal" aspect of the doctrine of "separate but

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[21] Ibid.
[22] *Hearing Before the United States Commission on Civil Rights, Tampa, Florida,* Mar. 29–31, 1976, p. 324.
[23] Ibid., p. 325.
[24] Ibid., p. 250.
[25] The NAACP was founded in 1909, and since its inception had fought for the rights of blacks in the courtroom. A legal arm of the NAACP was founded in 1939 with Thurgood Marshall as its head. It was eventually called the NAACP Legal Defense and Educational Fund, Inc.
[26] Kluger, *Simple Justice,* p. 132.
[27] Ibid., p. 134.
[28] Ibid., p. 136.
[29] Daniel M. Berman, *It Is So Ordered* (New York: W.W. Norton & Co., 1966), p. 6.

equal" and invalidated school segregation when tangible facilities provided for blacks were found unequal to those provided for whites. In 1938 in *State of Missouri ex rel. Gaines v. Canada,* [30] the Court considered the case of a black who had been denied admission to the School of Law at the all-white University of Missouri, a State institution. The State, in attempting to uphold the doctrine of separate but equal, offered to pay the black's tuition at the law school of an adjacent State that accepted blacks. The Court stated:

> The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of a State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right.[31]

Despite the decision of the Supreme Court of the United States, the black student never attended the law school of the University of Missouri. Missouri responded to the decision by passing legislation providing for establishment of a law school at Lincoln University, the black institution in Missouri.[32] Nevertheless, *Gaines* was to be viewed as a significant milestone. Counsel believed that the principles established in *Gaines* could be made to apply to every county in America, to every educational level, and not only to physical facilities, but also to teacher salaries, length of school terms, and the availability of bus transportation. They believed not only that the principles should cover the field of education, but that they should also apply to parks, libraries, hospitals, and other facilities.[33]

The Court again questioned the doctrine of "separate but equal" in 1948 in *Sipuel v. Board of Regents.* [34] The Supreme Court wrote that Ada Sipuel, a black woman who applied to the School of Law at the University of Oklahoma, was:

> entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the state. The state must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group.[35]

By 1950 the Supreme Court of the United States moved beyond the tangibles when considering the "separate but equal" doctrine to an assessment of intangible qualities. In *Sweatt v. Painter* [36] the Court ruled that Texas could not provide black students with equal educational opportunity in a separate law school. The case was not decided on the

[30] 305 U.S. 337 (1938).
[31] *Id.* at 349.
[32] *The Legal Barriers Crumble,* p. 23.
[33] Kluger, *Simple Justice,* p. 213.
[34] 332 U.S. 631 (1948).
[35] *Id.* at 632-33.
[36] 339 U.S. 629 (1948).

issue of facilities, although the facilities at the University of Texas Law School were clearly superior to those at the black law school. The key factor upon which the Court based its decision was that the University of Texas "possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school."[37] Further, the Court stated:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial group which number 85 percent of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.[38]

That same year the Court again addressed the issue of intangible considerations in *McLaurin v. Oklahoma State Regents for Higher Education.* [39] The Court required that a black student be treated like all other students and not be segregated within the institution. Engaging in discussions and exchanging views with other students, the Justices declared, are "intangible considerations" indispensable to equal educational opportunity.[40]

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[37] *Id.* at 634.
[38] *Id.*
[39] 339 U.S. 637 (1950).
[40] *Id.* at 641, 642.

Brown v. Board of Education

These cases laid the foundation for direct confrontation of the concept of "separate but equal," which was challenged in *Brown v. Board of Education.* [41] *Brown* was a consolidated case involving school segregation in four States: Kansas, Delaware, Virginia, and South Carolina. The lead case had begun in 1950 when the Rev. Oliver Brown had attempted to enroll his daughter at the traditionally white school four blocks from their home rather than have her travel by bus to the black school 2 miles away. One year later, Reverend Brown filed suit against the school board of Topeka, Kansas.[42] The four cases consolidated in *Brown* were all handled by the NAACP Legal Defense and Education Fund, Inc., which had previously attacked segregation in higher education and now turned its attention to the elementary and secondary education that directly affected all black children.[43]

In an unanimous opinion, the Supreme Court of the United States ruled that in public schools legally compelled segregation of students by race is a deprivation of the equal protection of the laws as guaranteed by the 14th amendment.[44] The opinion stated:

> To separate. . .[children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . .Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson,* this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

[41] 347 U.S. 483 (1954).
[42] *Twenty Years After Brown,* p. 1.
[43] Berman, *It is So Ordered,* pp. 28, 33.
[44] 347 U.S. at 495. In a companion case, Bolling v. Sharpe, 347 U.S. 497 (1954), the Court held that racial segregation in the District of Columbia violated the due process clause of the fifth amendment.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.[46]

The date was May 17, 1954.

Testimony by social scientists emphasized the serious psychological harm inflicted on children subjected to segregation. The testimony noted that racial isolation could result in black children developing inclinations towards escapism, withdrawal, hostility, and resentment. Furthermore, the social scientists noted that such treatment could warp black children's sense of self-esteem, since segregation was based on the belief that they were inferior to whites and thus not worthy of the treatment provided to white children.[46] Although the Court did not rely on it, testimony was also presented that white children could be scarred by the practice of racial isolation. They could experience "confusion, conflict, moral cynicism, and disrespect for authority," the testimony argued, as a "consequence of being taught the moral, religious, and democratic principles of the brotherhood of man and the importance of justice and fair play by the same persons and institutions who, by supporting racial segregation, seemed to be acting in a prejudiced and discriminatory manner.[47]

Although the holding in *Brown* was directed against legally sanctioned segregation in public education, the language in *Brown* gives support to a broader interpretation.[48] The Court expressly recognized the inherent inequality of all segregation, noting only that the sanction of law gives it greater effect.[49] *Brown* set the stage for the ending of Jim Crow laws and for prohibiting officially sanctioned racial segregation in almost every aspect of American life.[50]

Having disavowed "separate but equal" in public education, the Justices turned to the question of how to dismantle segregated education. The Court requested further arguments on implementation of the decision. Following oral argument, the Court handed down *Brown II* [51] in May 1955, which set the standard for implementation of school desegregation. Under the jurisdiction of district courts, the standard required a "good faith" start in the transformation from a dual to a unitary system "with all deliberate speed."[52]

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[46] 347 U.S. at 494, 495.
[46] Kenneth B. Clark, *Prejudice and Your Child* (Boston: Beacon Press, 1955), app. 3, Appendix to Appellants Briefs, pp. 166–84. *Prejudice and Your Child* is a summary and revision of the manuscript, "Effect of Prejudice and Discrimination on Personality Development," which Dr. Clark prepared for the midcentury White House Conference on Children and Youth, 1950. It was this manuscript that was cited in footnote 11 of the *Brown* decision.
[47] Ibid., p. 170.
[48] *Twenty Years After Brown*, p. 31; *The Legal Barriers Crumble*, p. 25.
[49] Ibid.
[50] *The Legal Barriers Crumble*, p. 25.
[51] 349 U.S. 294 (1955).
[52] *Id.* at 299, 301.

The Southern Response

Although blacks were to view the decision as a clear victory and movement towards the American mainstream, many whites, particularly southern whites, were resentful and angry. "With all deliberate speed" became a snail's pace, and the decision was resisted by officials in the Southern States.[53] In 1956 the "Southern Manifesto" was endorsed by nearly every elected Representative and Senator from the 11 Southern States. The manifesto pledged: "To use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation."[54] Segregation continued over the next decade under freedom-of-choice plans, transfer programs for white students into majority-white schools, the closing of public schools, and the provision of tuition grants and other aid to private white segregated schools.[55]

Litigation Continues

Black plaintiffs had to return to the courts repeatedly to secure implementation of *Brown.* In 1958 in *Cooper v. Aaron* [56] (Little Rock, Arkansas), the Supreme Court ruled that:

> [T]he constitutional rights of children not to be discriminated against in school admissions. . .can[not] be nullified indirectly. . .through evasive schemes of segregation whether attempted "ingeniously or ingenuously."[57]

[53] *Twenty Years After Brown,* p. 31.
[54] *The Legal Barriers Crumble,* p. 25.
[55] Ibid.
[56] 358 U.S. 1 (1958).
[57] *Id.* at 17.

The decision in the *Cooper* case followed mob scenes in Little Rock with segregationists trying to prevent the enrollment of nine black high school students at Central High School in September 1957.[58] These students were the first of thousands of black students who would commit themselves across the South to abolition of the Jim Crow society. Governor Orville Faubus called up the Arkansas National Guard to prevent the students from enrolling. Continuing violence led President Dwight Eisenhower to federalize the State forces and send in paratroopers to restore order and to escort the black students to school.[59]

Although the Court made clear that unequivocal resistance would be firmly condemned and although the executive branch stood firm in support of desegregation in Little Rock, massive resistance proved an apparent success. A decade after the *Brown* decision only 1.2 percent of black students in 11 Southern States attended schools with whites.[60] That figure had increased to only 2.2 percent in the following school year (1964–65) when the Civil Rights Act of 1964[61] was passed by the U.S. Congress.[62]

In 1964 the Supreme Court was again to show its impatience with tactics of evasion and delay in its decision in *Griffin v. County School Board of Prince Edward County, Va.* [63] Prince Edward County, whose officials fervently supported Virginia's "massive resistance" stance, had closed its public schools rather than permit black and white children to attend school together. The Court held that the action of the county school board in closing the public schools while, at the same time, contributing to the support of private segregated schools resulted in a denial of equal protection of the laws to black children.[64] Further, the Court ruled: "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia."[65] In 1965 the Supreme Court again stated, in *Bradley v. School Board of Richmond,* [66] that "delays in desegregating school systems are no longer tolerable." The Court clearly wanted an end to delay and evasion. However, segregation persisted, and the lower courts continued to accept techniques that postponed full

[58] *Twenty Years After Brown,* p. 17.
[59] Ibid., p. 18.
[60] Ibid., p. 48. Data are summarized from the Office for Civil Rights, U.S. Department of Health, Education, and Welfare's Survey, 1968, 1970, 1972 (hereafter cited as HEW Survey).
[61] 78 Stat. 252, Pub. L. No. 88–352, July 2, 1964.
[62] HEW Survey; *Twenty Years After Brown,* p. 48.
[63] 377 U.S. 218 (1964).
[64] *Id.* at 232.
[65] *Id.* at 234. The case was remanded to the district court with directions to enter a decree which would guarantee that petitioners received the kind of education provided in the other public school districts of the State. In regard to desegregation, this consisted of a freedom-of-choice program. See discussion of Green v. County School Board of New Kent County for a later decision by the Supreme Court that relates to freedom-of-choice plans.
[66] 382 U.S. 103 (1965).

realization of constitutional rights. Ten years after *Brown* racial segregation in public schools endured.

In 1968 the Supreme Court examined a freedom-of-choice plan developed to desegregate schools that had, in fact, left school segregation virtually intact. New Kent County, Virginia, had no residential segregation and only two schools, one black, one white. Under the county's freedom-of-choice plan, in operation for 3 years, no white child had chosen to attend the black school and only 15 percent of the black children had chosen to attend the formerly white school.[67] The issue was whether, under these circumstances, a freedom-of-choice plan was adequate to meet the command of *Brown* "to achieve a system of determining admission to public schools on a nonracial basis."[68]

In *Green v. County School Board of New Kent County,* [69] the Court ruled that "school boards such as the respondent. . .[were] clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[70] The Supreme Court further stated: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."[71]

Involvement of the Executive Branch

During the 5 years following the passage of the 1964 Civil Rights Act, more substantial progress was made toward implementing school desegregation than had been made through litigation in the preceding 10 years. This movement was accomplished by the Federal Government's threatening and occasionally using the fund termination enforcement mechanism available under Title VI of that act.[72] In 1964, 1.2 percent of black students in the South attended school with whites. By 1968 that figure had risen to 32 percent.[73]

The progress was to slow again when the emphasis on Federal enforcement shifted. The policy of a new national administration in 1969 apparently was to move away from the "administrative fund cut off requirements and return the burden, politically as well as actually to the courts for compliance."[74] On July 3, 1969, the Attorney General of the United States and the Secretary of Health, Education, and Welfare (HEW)

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[67] *Twenty Years After Brown,* pp. 35–36.
[68] Brown v. Board of Education, 349 U.S. 294, 300–01 (1955).
[69] 391 U.S. 430 (1968).
[70] *Id.* at 437, 438.
[71] *Id.* at 439.
[72] *Twenty Years After Brown,* pp. 34, 36; See also Marion Wright Edelman, "Southern School Desegregation, 1954–1973; A Judicial-Political Overview," *Blacks and the Law, Annals of the American Academy of Political and Social Science* (May 1973), p. 40 (hereafter cited as *Southern School Segregation).*
[73] *Twenty Years After Brown,* pp. 48, 50. This figure may include schools with only one black or one white pupil. It excludes only all-white and all-black schools.
[74] Ibid, p. 36; *Southern School Segregation,* p. 42.

reported that the Government was minimizing use of administrative enforcement under Title VI in favor of a return to litigation.[75] In the same statement, more than a year after the Supreme Court had dealt a substantial blow to freedom-of-choice plans in the *Green* decision, the executive branch of the Federal Government declared freedom-of-choice plans an acceptable means of desegregation if the school district could "demonstrate, on the basis of its record, that. . .the plan as a whole genuinely promises to achieve a complete end to racial discrimination at the earliest practicable date."[76]

Executive and Judicial Differences on Mississippi

In 1969 the Supreme Court ruled that the time for "all deliberate speed" had run out and that school desegregation was to occur "at once."[77] The case, *Alexander v. Holmes County Board of Education,* [78] involved 33 Mississippi school districts that were operating under ineffective freedom-of-choice plans. The national administration's changed policy on enforcement of school desegregation was clearly reflected in this case. The Department of Health, Education, and Welfare had assisted the districts in drafting "terminal" desegregation plans to be implemented in the fall of 1969.[79] The plans were submitted to three district court judges on August 11, 1969, but later the same month the Secretary of HEW requested that the submitted plans be withdrawn and that HEW be given until December to develop new plans.[80] The Secretary's request to the district judges stated that "the time allowed for the development of these terminal plans has been much too short" and that implementation of the plans "must surely in my judgment, produce chaos, confusion, and catastrophic educational setbacks."[81] Further, the Department of Justice intervened in the case against the position of black plaintiffs. The court of appeals granted the requested delay, causing plaintiffs' appeal to the Supreme Court of the United States. There, HEW requested that the Supreme Court grant the 33 districts additional time to develop "terminal" desegregation plans.[82] However, the Supreme Court ruled that:

> [T]he Court of Appeals should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court

[75] Ibid; statement by Robert H. Finch, Secretary of the Department of Health, Education, and Welfare, and John N. Mitchell, Attorney General, Press Release, July 3, 1969, p. 8.
[76] Ibid.
[77] 396 U.S. 19, 20 (1969).
[78] 396 U.S. 19 (1969).
[79] *Twenty Years After Brown,* p. 37.
[80] Ibid.
[81] Ibid. The Mississippi case was not unique. In 1969, for example, HEW also acquiesced in delaying desegregation in Alabama and South Carolina. See U.S., Commission on Civil Rights, *Federal Enforcement of School Desegregation* (1969), pp. 52, 56.
[82] Ibid.

the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.[83]

Despite the *Alexander* decision, the executive branch continued its cautious approach to school desegregation enforcement by electing to undergo round after round of negotiations, despite this approach's failure to achieve voluntary compliance. The timely use of the fund termination enforcement sanction simply was not invoked.

The Issue of Busing Surfaces

In 1970 the President of the United States issued a statement on elementary and secondary school desegregation in which the question of busing for school desegregation purposes was raised.[84] The President cautioned that desegregation must proceed with the least possible disruption and emphasized the desirability of maintaining the neighborhood school principle.[85] In another statement in 1971 the President maintained that he "consistently opposed the busing of our nation's school children to achieve racial balance" and that he was "opposed to the busing of children simply for the sake of busing." The President also said that he had instructed the Attorney General and the Secretary of HEW "to hold busing to the minimum required by the law."[86]

In May 1971 the Supreme Court addressed these issues in *Swann v. Charlotte-Mecklenburg Board of Education* [87] and, in an unanimous opinion written by Chief Justice Burger, approved a comprehensive desegregation plan while holding that bus transportation is "a normal and accepted tool of educational policy" and that "desegregation plans cannot be limited to the walk-in school."[88] The Court did, however, recognize that valid objections might be made to busing "when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process."[89] The Court discussed appropriate limits on transportation, stating, "limits on time of travel will vary with many factors, but probably none more than the age of the students."[90] The opinion stated:

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot

[83] 396 U.S. at 20 (1969).
[84] 1970 Pub. Papers No. 91, p. 304, Mar. 24.
[85] Ibid.
[86] 1971 Pub. Papers No. 249, p. 848, 894, Aug. 3.
[87] 402 U.S. 1 (1971).
[88] *Id.* at 29, 30.
[89] *Id.* at 30–31.
[90] *Id.* at 31.

be avoided in the interim period when remedial adjustments are being made to eliminate the dual systems.[91]

The *Swann* decision also addressed the use of a racial mathematical ratio for assigning students to school. The Justices found that such a ratio "was within the equitable remedial discretion of the district court," as it was "no more than a starting point in the process of shaping a remedy rather than an inflexible requirement."[92] They noted, "Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations."[93]

Further, the Court found clear evidence of intent to discriminate on the part of school and government officials:

> The District Court held numerous hearings and received voluminous evidence. In addition to finding certain actions of the school board to be discriminatory, the court also found that residential patterns in the city resulted in part from federal, state, and local government action other than school board decisions. School board action based on these patterns, for example by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of the immediate neighborhoods, resulted in segregated education.[94]

The litigation in the *Swann* case continued for 6 years before a final decision was handed down by the Supreme Court (1965–71).[95] The school board was given several opportunities "to submit a lawful plan (one which desegregates all the schools)" before the District Court for the Western District of North Carolina was to order the implementation of a desegregation plan in 1970, affirmed by the Supreme Court in 1971.[96] In ordering the implementation of an effective desegregation plan in 1970, District Court Judge James McMillan stated: "This default on their [school board] part leaves the court in the position of being forced to prepare or choose a lawful plan."[97]

In light of the local opposition to desegregation in Charlotte in 1971, it is notable that in June 1981, there was a celebration in Charlotte to honor Judge McMillan, who made the initial decision in the *Swann* case, and the NAACP Legal Defense Fund attorney who represented the plaintiffs, Julius L. Chambers.[98] More than 300 citizens representing an impressive cross section of Charlotte-Mecklenburg turned out for the local celebration, and the school board canceled its meeting to attend the dinner celebration.[99] The *Charlotte Observer* noted in retrospect:

> Prior to busing, Charlotte was much more segregated than it is now. Not only were its schools identifiably white or black, but the community itself was divided along racial

[91] *Id.*
[92] *Id.* at 25.
[93] *Id.*
[94] *Id.* at 7
[95] *Id.*
[96] 311 F. Supp. 265, 267 (1970); 402 U.S. at 32.
[97] 311 F. Supp. 267.
[98] *Charlotte Observer*, June 24, 1981, p. 2C.
[99] Ibid.

lines. . . .Through the use of busing, schools are no longer black or white, but are simply schools. . . .The center city and its environs are a healthy mixture of black and white neighborhoods. In fact, there is reason to believe school desegregation has encouraged neighborhood desegregation to a degree that allows a reduction in busing.[100]

[100] Ibid.

Desegregation in the North

Lawsuits against segregated education were not confined to the South. Although the more compelling effect of the *Brown* decision was on the 17 Southern and Border States that required school segregation, its effect was also felt in Northern and Western States. Contrary to the popular belief that school segregation in the North and West resulted from segregated housing patterns that occurred naturally, litigation was to demonstrate clearly that in many school districts segregation was the direct result of deliberate actions by school boards and administrators and often by local and State government officials also.[101] Moreover, courts have only ordered school desegregation in districts when the evidence presented has clearly shown that existing school segregation resulted from actions of school authorities and government officials.[102]

It was only after provision of such evidence that northern cases were won by plaintiffs. Earlier cases were based on the principle that racial isolation in the public schools, whether caused directly by school officials or not, unconstitutionally deprived black children of equal educational opportunity. Litigation by plaintiffs pursuing this approach proved unsuccessful. However, many States outside of the South did have laws that provided for segregated public education and that remained in effect well into the 20th century. In 1868 when the 14th amendment was adopted, eight States that had not belonged to the Confederacy had laws providing for separate schools for black children (California, Kansas, Missouri, Nevada, New York, Ohio, Pennsylvania, and West Virginia). The laws of five other non-Confederate States either directly or by

[101] See *Twenty Years After Brown*, pp. 41–42; Gary Orfield, *Must We Bus?* (Washington, D.C.: The Brookings Institution, 1978), pp. 15–24; Center for National Policy Review, *Why Must Northern School Systems Desegregate? A Summary of Federal Court Findings in Recent Cases* (January 1977) (hereafter cited as *Why Must Northern School Systems Desegregate?).*

[102] *Why Must Northern School Systems Desegregate?* Introduction, p. 1.

implication excluded black children entirely from public schools (Delaware, Illinois, Indiana, Kentucky, and Maryland). Indiana had such a statute until 1949.[103] In other northern areas explicit school board policy maintained segregation and the designation of schools as black schools. Racial identification was often accomplished by naming a school after a famous black.[104] Northern school segregation was also created and maintained through manipulation of the location, size, and grade structure of new school buildings and by the selective use of building additions and portable classrooms to contain growing black populations in the same segregated school.[105] Segregated schools were also promoted through discriminatory student assignment. Attendance zones were gerrymandered to promote segregation, and optional attendance zones and open enrollments and transfers often allowed whites to leave predominantly black schools. Busing of students has also been used in the North to maintain segregation.[106] For example, in Detroit, Michigan, black children were transported past white schools to more distant schools that were predominantly black. In Pasadena, California, when a white school was closed for 2 years for renovation, the students were transported past five majority-black schools to a school with one black student 3 miles across a major thoroughfare.[107]

The Supreme Court Addresses School Segregation in the North

The first northern school desegregation case decided by the Supreme Court illustrates many of these techniques. The outcome of *Keyes v. School District No. 1, Denver, Colorado* [108] lay in the carefully detailed proof of intentional actions by the Denver school board that resulted in segregation. The lower court and the Supreme Court ruled that, despite the fact that Colorado had never had a school segregation law, and in fact had a specific antidiscrimination clause in its constitution, the actions of the school authorities were sufficient to establish *de jure* segregation.[109] The Justices wrote that the Denver school system:

> has never been operated under constitutional or statutory provisions that mandated or permitted racial segregation in public education. Rather, the gravamen of this action. . .is that respondent School Board alone, by use of various techniques such as the manipulation of student attendance zones, school site selection and a neighborhood school policy, created or maintained racially or ethnically (or both racially and ethnically) segregated schools

[103] *Why Must Northern School Systems Desegregate?* History of Official Segregation, p. 2; *Report of the U.S. Commission on Civil Rights 1959, Part Three: Public Education,* footnotes 3 and 4, pp. 147–48.
[104] *Why Must Northern School Systems Desegregate?* p. 3.
[105] Ibid., pp. 2-13; Orfield, *Must We Bus?* pp. 15–24.
[106] *Why Must Northern School Systems Desegregate?* p. 13.
[107] Ibid.
[108] 413 U.S. 189 (1973).
[109] *Id.* at 201.

throughout the school district entitling petitioners to a decree directing desegregation of the entire school district.[110]

Further evidence documented that "the Board's policies. . .show an undeviating purpose to isolate Negro students in segregated schools while preserving the Anglo character of [other] schools."[111] The Court found that "there was uncontroverted evidence that teachers and staff had for years been assigned on the basis of a minority teacher to a minority school throughout the school system."[112]

An important finding by the Supreme Court in *Keyes* was that the lower court erred in not placing blacks and Hispanics in the same category for purposes of defining segregated schools, since both groups suffer the same educational inequities when their treatment is compared with the treatment afforded Anglo students.[113] The Supreme Court concluded that schools with a combined predominance of the two groups should be included in the category of segregated schools.[114]

The first northern decision rendered by the Supreme Court was handed down in 1973, after 4 years of litigation and almost 20 years after the *Brown* decision. Similar evidence of segregation maintained by explicit school board policy has been outlined in numerous post-*Brown* cases in the North.

Litigation Continues in the North

In the Boston school desegregation case *(Morgan v. Hennigan),* [115] evidence demonstrated that Boston used a discriminatory "feeder" system for enrollment in the system's high schools. Graduates of white elementary schools were given enrollment preference at white high schools, and blacks similarly were given preference only at black high schools.[116] The district judge in the case found that:

> Several practices of the defendants were antithetical to a neighborhood school system: extensive busing, open enrollment, multi-school districts, magnet schools, citywide schools and feeder patterns. Additionally, the elementary districts map does not show districting which would be consistent with a neighborhood school policy: Schools are not located near the center of regular, compact districts, but rather near the edges of irregular districts requiring some students to attend a relatively distant school when there is another school within one or two blocks.[117]

The district judge's decision on June 21, 1974, that the Boston School Committee had unconstitutionally fostered and maintained a segregated public school system, and that the policies had been "knowingly" designed

[110] *Id.* at 191.
[111] *Id.* at 198–99.
[112] *Id.* at 200.
[113] *Id.* at 197, 198.
[114] *Id.*
[115] 379 F. Supp. 410, 472 (D. Mass. 1974), *aff'd sub nom.* Morgan v. Kerrigan, 502 F.2d 58 (1st Cir. 1974), *cert. denied,* 421 U.S. 963, May 12, 1975.
[116] *Why Must Northern School Systems Desegregate?* p. 11.
[117] Case I, p. 473, as reported in *Why Must Northern School Systems Desegregate?* p. 12.

to foster segregation, culminated years of State and Federal attempts to secure the school system's desegregation.[118] Between 1965 and 1973, Massachusetts education authorities had sought to implement the State Racial Imbalance Act of 1965 and to compel the Boston School Committee to integrate a substantial portion of its public schools. A host of State agencies were involved and suits and countersuits were filed in State courts.[119] By 1971, however, the Boston public schools were more segregated than ever. In view of this segregation and the continued defiance of the State by the Boston School Committee, the local chapter of the National Association for the Advancement of Colored People filed suit in Federal district court in March 1972.[120] In November 1971 the U.S. Department of Health, Education, and Welfare charged the school committee with discrimination in certain educational programs. This charge was the first step in HEW's administrative hearing process that would lead 2 years later to a finding of discrimination and a threat to terminate all Federal education funds.[121]

In the Detroit school desegregation case, *Milliken v. Bradley,* [122] the district court held that the Detroit public school system was racially segregated as a result of unconstitutional practices of the Detroit Board of Education and State defendants.[123] Among techniques used were optional attendance zones that created schools identifiable by race and religion:

> During the decade beginning in 1950 the Board created and maintained optional attendance zones in neighborhoods undergoing racial transition and between high school attendance areas of opposite predominant racial compositions. In 1959 there were eight basic optional attendance areas affecting 21 schools. Optional attendance areas provided pupils living within certain elementary areas a choice of attendance at one of two high schools. . .the natural, probable, forseeable and actual effect of these optional zones was to allow white youngsters to escape identifiable "black" schools. There had also been an optional zone (eliminated between 1956 and 1959) created in "an attempt to separate Jews and Gentiles within the system" the effect of which was that Jewish youngsters went to Mumford High School and Gentile youngsters went to Cooley.[124]

Further evidence was presented to document the Detroit School Board's techniques for helping to assure segregation, including attendance lines that maximized segregation by allowing whites to flee desegregation, transportation of black students from overcrowded schools to majority-black schools past closer white schools with available space, establishment of grade structures and feeder patterns that promoted segregation, and school construction that promoted segregation. The Court also cited State

[118] 379 F. Supp. 410.
[119] U.S., Commission on Civil Rights, *Desegregating the Boston Public Schools: A Crisis in Civic Responsibility* (August 1975), p. xvi.
[120] Ibid.
[121] Ibid., p. xvii.
[122] 418 U.S. 717 (1974).
[123] *Id.* at 724.
[124] Milliken v. Bradley, 338 F. Supp. 582, 587 (E.D. Mich. 1971), *aff'd,* 484 F.2d 215 (6th Cir. 1973) *rev'd,* 418 U.S. 117 (1974).

actions in the supervision of school site selections that exacerbated segregation and the State's involvement in discriminatory interdistrict transportation of black students.[125] The district court in the *Milliken* case included 53 suburban school districts in addition to Detroit in the desegregation order. The court of appeals subsequently held that the record fully supported the findings of racial discrimination and segregation in Detroit and that the district court was authorized and required to take effective measures to desegregate the school system.[126] It also agreed that "any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems.[127]

The Supreme Court ruled on the *Milliken* case in 1974.[128] The Court's decision in *Milliken* reaffirmed the finding in *Brown* that "separate educational facilities are inherently unequal."[129] Although it acknowledged that the task in *Milliken* was desegregation of the Detroit public schools, the Supreme Court held that both the district court and the court of appeals had erred in shifting "the primary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable."[130] The Court held that there was no showing of constitutional violations by the surrounding school systems, and thus they should not be included in the remedy: "With no showing of *significant* [emphasis added] violation by the 53 outlying school districts and no evidence of any inter-district violation or effect the court went beyond the original theory of the case as framed by the pleadings. . . ."[131] Dismantling a dual school system, the Court said, does not require any particular racial ratio in each school, grade, or classroom.[132] The Court did state, however, that "school district lines may be bridged when there has been a constitutional violation calling for interdistrict relief."[133]

Metropolitan Plans

Since the attempt at metropolitanism in *Milliken,* however, metropolitan school desegregation plans have been ordered in several cases where constitutional violations have been shown throughout the metropolitan area. In April 1980 the Supreme Court refused to review *Delaware State Board of Education v. Evans.*[134] The refusal let stand a district court order

[125] *Twenty Years After Brown,* p. 45.
[126] 418 U.S. at 733, 735.
[127] *Id.* at 745.
[128] *Id.* at 722.
[129] *Id.* at 737.
[130] *Id.* at 740.
[131] *Id.* at 745.
[132] *Id.* at 740–41.
[133] *Id.* at 741.
[134] 100 S. Ct. 1862 (1980). In November 1980 the Delaware Board of Education approved a plan carving up the New Castle County School District into four school districts. Minority plaintiffs brought suit against

that provides for interdistrict transportation among 11 school districts in the Wilmington, Delaware, area. The Wilmington consolidated school district was established in the fall of 1978. The U.S. Court of Appeals for the Third Circuit found an "uncured condition of *de jure* segregation exacerbated by housing discrimination that confined blacks to the city of Wilmington."[135] The court concluded that an interdistrict remedy would be appropriate, based on its findings that:

1) there had been a failure to alter the historic pattern of inter-district segregation in Northern New Castle County;

2) governmental authorities at the State and local levels were responsible to a significant degree for increasing the disparity in residential and school populations between Wilmington and the suburbs;

3) the City of Wilmington had been unconstitutionally excluded from other school districts by the State Board of Education, pursuant to a withholding of reorganization powers under the Delaware Educational Advancement Act of 1968.[136]

The Wilmington, Delaware, school system was involved in one of the four cases included in the consolidated *Brown* decision in 1954. The appeals court decision in 1976 stated:

Although Delaware state court proceedings addressed this very serious constitutional problem as far back as 1952, this case has continuously commanded the attention of the federal courts—the district court, this court and the Supreme Court since 1957. . . .The Wilmington schools which had been *de jure* black schools prior to the Supreme Court's decision in *Brown* . . .continued to remain identifiably black and that the dual school system in Wilmington had not been eliminated.[137]

In October 1980 the Supreme Court of the United States denied a petition for a writ of *certiorari* in another school desegregation case that involves a metropolitan remedy. The denial let stand a metropolitan school desegregation plan in *Board of School Commissioners of the City of Indianapolis v. Metropolitan Development Commission of Marion County.*[138] The interdistrict remedy was ordered only after evidence of interdistrict violations was presented. The court of appeals held that the remedy was justified, since the district court had found that the Indiana General Assembly had a discriminatory purpose in enacting a unified government for the Indianapolis area that excluded schools from the metropolitan consolidation.[139] Further evidence demonstrated that:

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the plan in Federal district court. Federal District Court Judge Schwartz, however, declared the subdivisions acceptable and stated that they would not endanger desegregation. He accepted the State board's statistics showing that the four school districts should be "very nearly equal" in overall racial composition at least through 1983. An appeal by the plaintiffs is anticipated.

[135] 582 F.2d 750 (3rd Cir. 1978), *cert. denied,* 446 U.S. 923 (1980).

[136] *Id.;* 416 F. Supp. 328 (D. Del. 1976), *rehearing denied,* 434 U.S. 944 (1977).

[137] 582 F.2d at 756.

[138] 101 S. Ct. 115 (1980).

[139] 573 F.2d 400, 407, 408 (7th Cir. 1978).

In the area of schools, Negroes, mulattoes and their children were barred from admission to the common schools by an act of 1861. In 1869, after the adoption of the Fourteenth Amendment, a law was adopted which provided for the education of Negro children, but only in segregated schools.[140]

. . .Successive School Boards of the City of Indianapolis after Brown continued policies of de jure segregation in the operation of the [Indianapolis Public Schools] up until the time of this court's first decision in 1971, aided and abetted by officials of the State of Indiana. During the same period of time (1954–1971) the HACI (Housing Authority of the City of Indianapolis), with the approval of the Commission, built numerous public housing projects in IPS territory, inhabited 98% by Negroes, but none in the territory of any of the suburban Marion County defendants, all of whom have consistently opposed such housing projects. The suburban defendants also unanimously opposed consolidation of all Marion County schools, as proposed pursuant to the Indiana School Reorganization Act of 1959, and they were successful.[141]

In Detroit, Wilmington, and Indianapolis, the remedial decrees granted were to correct constitutional violations and to eradicate their effects. Further, the final decisions were rendered and school desegregation ordered after lengthy litigation covering many years. At the hearings exhaustive evidence was presented that segregation had been intentionally promoted and maintained by illegal actions on the part of school and government officials.

[140] 456 F. Supp. 183, 186 (S.D. Ind. 1978), *aff'd*, 573 F.2d 400 (7th Cir. 1978), *cert. denied*, 439 U.S. 824 (1978).
[141] *Id.* at 187.

Recent Congressional Actions

In recent years efforts by the U.S. Congress to limit the Federal Government's involvement in school desegregation when transportation of students is required have, in some instances, slowed the progress of school desegregation. Every year since 1978, the Congress has attached an amendment offered by Sens. Thomas Eagleton (D–Mo.) and Joseph Biden (D–Del.) to the appropriations bills for the U.S. Department of Health, Education, and Welfare (now the Department of Education), forbidding that Department from terminating Federal funds in desegregation cases where compliance would require transportation of pupils beyond the school nearest their residence.[142] Since 1978 the Commission has opposed the Eagleton-Biden amendment, declaring that its adoption would impair the effectiveness of Title VI of the Civil Rights Act of 1964[143] by denying to the Federal Government the important administrative remedy of terminating Federal funds to unconstitutionally segregated schools.[144] The Commission has expressed grave concern that the net result of the enactment of Eagleton-Biden would be an actual violation, on the part of the Federal Government, of the fifth amendment and Title VI.[145]

Congress has also attempted by an amendment to limit the efforts of the Department of Justice to require school desegregation. Initially introduced

[142] The Eagleton-Biden amendment was initially a provision added by the Senate Committee on Appropriations to H.R. 7555, a bill providing appropriations for the Departments of Labor and HEW for fiscal year 1978. Both the Senate and the subsequent conference committee retained the amendment. The Eagleton-Biden language was enacted into law as part of H.J. Res. 662, incorporating by reference the provisions of the conference report to H.R. 7555, Cong. Rec. H7951 (daily ed. Aug. 27, 1980).

[143] 78 Stat. 252, Pub. L. No. 88–352, July 2, 1964; Title VI of the Civil Rights Act of 1964 provides for nondiscrimination in all federally assisted programs.

[144] Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, testimony before Senate Judiciary Committee, 95th Cong., 1st sess., July 22, 1977.

[145] Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, letter to President Jimmy Carter, May 16, 1978.

by Rep. James Collins (R–Tex.) as an amendment to the Department of Justice appropriations bill for 1979, the amendment stated:

> No sums authorized to be appropriated by this Act shall be used to bring about any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home except for a student requiring special education as a result of being mentally or physically handicapped.[146]

The House-passed amendment was deleted in conference committee in 1978 and 1979.[147] It passed in the Senate and in the House of Representatives in 1980, but then-President Jimmy Carter vetoed the appropriations bill to which it was attached, and Congress did not override the veto.[148] In vetoing the appropriations bill, the President stated that the amendment:

> would impose an unprecedented prohibition on the power of the President of the United States and the Attorney General to seek a particular remedy in the Federal courts that in some cases may be necessary to ensure that our Constitution and laws are faithfully executed.[149]

The Commission has opposed this "Collins" amendment since its initial introduction and has questioned its constitutionality.[150] Further, the Commission urged the President to veto the Department of Justice appropriation bill for fiscal year 1981 and later commended him for taking such action.[151] The amendment, reintroduced in the 97th Congress, has passed the House, and a similar restriction, offered by Sen. Jesse Helms (R.–N.C.), has passed the Senate.[152] The adoption and enactment of the Collins-Helms amendment would foreclose the remedy of litigation to enforce Title VI when transportation of students is necessary. This provision, in conjunction with the Eagleton-Biden amendment, would deny the Federal Government any enforcement mechanism in school desegregation cases where transportation of students is required, thus raising a question of constitutionality.[153]

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[146] Cong. Rec. H7403 (daily ed. July 26, 1978).

[147] 124 Cong. Rec. H13020 (daily ed. Oct. 14, 1978). *Congressional Quarterly Report,* Oct. 21, 1978, p. 3053.

[148] *Washington Post,* Nov. 14, 1980, p. A1.; *New York Times,* Nov. 14, 1980; Office of the White House Press Secretary, Press Release to the House of Representatives, Dec. 13, 1980.

[149] Ibid.

[150] See U.S., Commission on Civil Rights, *Desegregation of the Nation's Public Schools: A Status Report* (February 1979), p. 11 (hereafter cited as *A Status Report).*

[151] U.S., Commission on Civil Rights, letter to the President, Nov. 21, 1980; *Report to the President and Congress* (January 1981), p. 12.

[152] 127 Cong. Rec. H2797–2800 (daily ed. June 9, 1981); *Washington Post,* June 17, 1981, p. A4; 127 Cong. Rec. S9727 (daily ed. Sept. 16, 1981); *Washington Post,* Sept. 17, 1981, p. A–7. The amendment as attached to the Department of Justice authorization bill by the House would deny to the Department the right to spend funds to bring school desegregation cases that require transportation of students beyond the school nearest to the student's home. The amendment passed by the Senate adds the restriction "or maintain" school desegregation cases.

[153] The constitutionality of the Eagleton-Biden amendment was challenged in Brown v. Califano where it was alleged that "desegregation-inhibiting measures. . .will inevitably bring the Federal government into a position of having to support segregated educational systems." The judge held that the amendment was not unconstitutional on its face, as there were two avenues through which HEW (and now ED) could secure compliance with Title VI by recipients of Federal funds: These were fund termination and referral to the Department of Justice for litigation, and the Eagleton-Biden amendment closed off only the first. The court further stated: "Should further proceedings in this case reveal that the litigation option left undisturbed by

Additional antischool desegregation legislation has been introduced in Congress in 1981. One bill is a constitutional amendment to prohibit Federal courts from requiring that any person be assigned to, or excluded from, any school on the basis of race, religion, or national origin.[154] Similarly, the Neighborhood School Act of 1981 attempts to define and limit the conditions under which Federal courts can order student assignment and transportation as remedies for unconstitutional public school segregation.[155] Language contained in this bill was offered as an amendment to the Department of Justice authorization for fiscal year 1982 (S. 951) by Sens. Jesse Helms and J. Bennett Johnston (D.–La.) and passed the Senate on September 16, 1981.[156]

As the Commission has previously stated, such congressional proposals, if enacted, would have a detrimental effect on efforts to provide equality of educational opportunity.[157] The proposals suggest to the American public that the constitutional issue remains unsettled, although it was clearly decided by the Supreme Court of the United States in 1954 when the Court declared that State-imposed racial segregation deprived public school students of the equal protection of the laws as guaranteed under the 14th amendment.[158] In addition, the issue of transporting students to achieve school desegregation was resolved more than a decade ago when the Supreme Court of the United States stated in the *Swann* [159] decision that "the importance of bus transportation as a normal and accepted tool of educational policy is readily discernible. . ." and that "desegregation plans cannot be limited to the walk-in school."[160] Further, these efforts present a false picture to the country. School transportation in support of desegregation plans is presented as a phenomenon that must be stopped because it is ineffective and detrimental to the education of America's school children.

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these provisions cannot, *or will not* [original emphasis] be made into a workable instrument for effecting equal educational opportunities, the Court will entertain a renewed challenge by plaintiffs on an as applied basis." Brown v. Califano, No. 75–1068 (D.D.C, July 17, 1978) (order denying motion for declaratory and injunctive relief). This language suggests that a constitutional challenge may be successful.

[154] H.J. Res. 56, introduced by Rep. Ronald Mottl (D–Ohio) on Jan. 5, 1981. In the 96th Congress, Representative Mottl was successful in bringing a different antibusing constitutional amendment (H.J. Res. 74) to the floor of the House. The Commission opposed this amendment in a letter to Rep. Don Edwards, dated July 13, 1979. The amendment, which required two-thirds of both House and Senate for approval, was defeated July 24, 1979, by a vote of 209 yeas to 216 nays.

[155] H.R. 2047 (companion bill S. 528), introduced Feb. 24, 1981, by Rep. Henson Moore (R.–La.).

[156] S. 951, Amendment No. 96, June 19, 1981. See Sen. Lowell Weicker (R.–Conn.), letter of June 25, 1981, to Commission Chairman Arthur S. Flemming; 127 Cong. Rec. S9727 (daily ed. Sept. 16, 1981); *Washington Post*, Sept. 17, 1981, p. A–7; U.S., Commission on Civil Rights, 97th Congress Bills Staff Report, Sept. 18, 1981, p. 8.

[157] See U.S., Commission on Civil Rights, *The State of Civil Rights: 1979* (January 1980), p. 18; *A Status Report*, p. 72.

[158] 347 U.S. 497 (1954).

[159] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[160] *Id.* at 29, 30.

Recent Executive Branch Actions

Recent decisions by the Department of Justice in pending cases concerning educational opportunity and school desegregation are also of serious concern to the Commission.

The Department of Justice recently changed its position in the case of *Washington v. Seattle School District No. 1.* [161] The United States as intervenor had successfully challenged up through the court of appeals the constitutionality of a Washington State initiative prohibiting student assignment to schools beyond the schools nearest or next nearest the student's home except where such assignment was made for health, safety, or special education purposes or in response to inadequate or unfit conditions.[162] The opinions of the lower Federal courts make clear that the initiative was a reaction to voluntary efforts by three local school districts to cure a substantial racial imbalance in their public schools that was caused by persistent patterns of housing segregation.[163] Nonetheless, the United States is now supporting the statute and has urged the Supreme Court to review the case as an example of a valid exercise of State constitutional authority over public education.[164]

In a second reversal of a prior position, the Department of Justice entered into a joint statement on August 28, 1981, with the Chicago Board of Education approving a desegregation plan that the Department had rejected as "incomplete" a month earlier.[165] In particular, Department

[161] Memorandum for the U.S., Washington v. Seattle School District No. 1, 633 F.2d 1338 (9th Cir. 1980), appeal docketed, No. 81-9 (S. Ct., June 24, 1981) (hereafter cited as *Memorandum for the U.S.)*
[162] *Id.*
[163] *Id.*
[164] *Memorandum for the U.S.*
[165] Joint Statement of the United States and the Chicago Board of Education, United States v. Board of Education of Chicago, No. 80C 5124 (N.D. Ill., Aug. 28, 1981).

lawyers had objected that the plan would not achieve systemwide school desegregation by September 1981 as required by a consent decree and did not contemplate undertaking mandatory desegregation measures including busing until September 1983 after voluntary measures had been tried and failed.[166] The joint statement accepts these fundamental flaws of the board's plan.

Also, in August 1981, the Department elected not to appeal the dismissal of its efforts to achieve multidistrict school desegregation in a suit against the Houston Independent School District and other districts.[167]

The Commission has followed with great interest the legal activity following the enactment of a Texas statute that permits local school districts to deny enrollments in the public schools to alien children not lawfully admitted into the country or to charge them tuition if they do enroll, and prohibits local school districts any State funds for the education of such children.[168] Although the statute does not concern desegregation, we believe that the principle of equal access to public education is completely in harmony with the constitutional mandate to desegregate our Nation's schools. We were pleased, therefore, when two district courts and the court of appeals ruled the statute unconstitutional in *Plyer v. Doe* [169] and *In Re: Alien Children.* [170]

The United States took a leadership role in challenging the constitutionality of the Texas statute. The United States intervened as a plaintiff at the district court level in *In Re: Alien Children,* claiming that the statute was invalid under the equal protection clause and pressed the same argument in an *amicus curiae* brief before the court of appeals in *Plyer v. Doe* and subsequently moved for summary affirmance in *In Re: Alien Children.* [171]

However, in a reversal of its position, the Department of Justice has filed a brief with the U.S. Supreme Court in those cases asserting that "whether local school districts are constitutionally required to admit [school-age children who entered the country illegally or whether the State of Texas is obligated to pay for their education] are issues that affect the State of Texas and the school districts, not the United States."[172]

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[166] Response of the United States to the Desegregation Plan and Supporting Documents Filed by the Board of Education of the City of Chicago, No. 80C 5124 (N.D. Ill., July 21, 1981).

[167] Memorandum and Order (10,444, issued June 17, 1981); Ross v. Houston Independent School District, 282 F.2d 95 (5th Cir. 1960) *stayed and cert. denied,* 364 U.S. 803 (1960); *New York Times,* Aug. 28, 1981, p. A10.

[168] In Re: Alien Children Education Litigation, 501 F. Supp. 544 (S.D. Tex. 1980), *(summarily aff'd* at J.S. App. 9,—); Doe v. Plyer, 628 F.2d 448 (5th Cir. 1980).

[169] 628 F.2d 448 (5th Cir. 1980).

[170] 501 F. Supp. 544 (S.D. Tex. 1980).

[171] In Re: Alien Children Education Litigation, 501 F. Supp. 544 (S.D. Tex. 1980) *(summarily aff'd* at J.S. App. 9,—); Doe v. Plyer, 628 F.2d 448 (5th Cir. 1980).

[172] Brief for the United States as Amicus Curiae in No. 80-1538 and Brief for the United States in No. 80-1934, Plyer v. Doe, In Re: Alien Children Education Litigation, Texas v. Certain Named and Unnamed Undocumented Alien Children, 501 F. Supp. 544 (S.D. Tex. 1980) and 628 F.2d 448 (5th Cir. 1980), appeals docketed, Nos. 80-1538 and 80-1934 (S. Ct., filed Feb. 12, 1981, and May 8, 1981).

Taken together, the positions espoused by the Department of Justice in these four cases appear to reflect a change of policy which cannot help but be of deep concern to those who believe that, as the Supreme Court found in *Brown v. Board of Education,* segregated educational facilities are inherently unequal.[172]

[172] 347 U.S. at 495.

The Status of School Desegregation

School desegregation has taken place successfully in many communities across the country. In 1954, in the South, less than 1 percent of black students attended schools with white students. By 1968, 18 percent of black students in the South attended schools that were more than 50 percent white, and by 1978, 44 percent of black students attended schools more than 50 percent white. Nationwide in 1968, some 23 percent of black students attended majority-white schools.[174] By 1978 this figure had increased to over 38 percent.[175] These same figures make it clear, however, that the promise of *Brown* remains unfulfilled for many students. In the 1978–79 school year, 6,218,024 minority students (60.2 percent) attended schools that were at least 50 percent minority, and 37 percent attended schools that were at least 80 percent minority.[176]

Desegregation remains an unresolved issue in many of the Nation's largest school districts despite years of litigation and/or pressure from the Federal Government. For example, Chicago's school system remains segregated, although the system has been cited on numerous occasions dating back to 1964 for violations of Federal regulations governing desegregation of pupils and teachers.[177] Similarly, the New York City school system, which in the 1978–79 school year enrolled 998,947 students,

[174] "Distribution of Minority Pupils by Minority School Distribution, May 1980," prepared for the Office for Civil Rights, U.S. Department of Education, by Killalea Associates, Inc. Percentages were tabulated by Commission staff from data contained in this document and U.S. Department of Health, Education, and Welfare data as summarized in *Twenty Years After Brown*, pp. 48–51.

[175] Ibid.

[176] Ibid.

[177] In October 1965 initial attempts were made by HEW to withhold Federal funds from the Chicago public school system. Francis Keppel, then-Commissioner of Education, delayed approval of $32 million in aid funds to the Chicago system because of its "probable noncompliance" with Title VI of the Civil Rights Act. The Office of Education of HEW reversed itself under heavy attacks from Chicago officials. Moreover, as the result of this action, the administration imposed new limitations on the exercise of the

has experienced only limited desegregation, despite the fact that it has been charged by the Federal Government on several occasions with discrimination against minority students.[178] Following a decade of litigation and out-of-court negotiations, the Philadelphia school system in September 1978 began implementation of a voluntary desegregation plan that was to be phased in over a 3-year period. The plan has resulted in limited desegregation in a system that enrolled 244,725 students in the 1978–79 school year, of whom 62 percent were black, 6 percent were Hispanic, and 31 percent were white.[179]

The Need for Metropolitan Plans

In many urban centers of the Nation, desegregated education for students can be accomplished most effectively through metropolitan remedies because minorities predominate in the inner cities of large urban areas. Accordingly, some northern cities under court order to desegregate are insisting that only metropolitan school desegregation plans will successfully desegregate their schools. Thus, part of the school desegregation order in the St. Louis, Missouri, case included a commitment by the board of education to seek to develop interdistrict plans for voluntary cooperation with school districts in St. Louis County.[180] Evidence presented at the trial established that neighborhood boundaries of black schools expanded as black families moved, while those of white schools contracted as white families departed. Furthermore, white children were bused to other predominantly white schools to relieve overcrowding rather than to nearer black schools that had available space.[181] The court of appeals found that the St. Louis County suburban school districts "collaborated with each other and with the City of St. Louis to ensure the maintenance of segregated schools. . . ."[182]

In February 1981 the St. Louis school board extended the time frame on efforts to desegregate the city schools with the voluntary help of suburban districts by 2 months.[183] Voluntary interdistrict desegregation efforts were reported as means to avert a mandatory cross-district plan involving the city of St. Louis and surrounding counties.[184] On May 4, 1981, the U.S.

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fund termination sanction. The confrontation seriously weakened the position of Commissioner Keppel and he resigned within months. See Gary Orfield, *The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act* (New York: Wiley-Interscience, 1969), pp. 151–207.

[178] U.S., Department of Education, Office for Civil Rights, *Directory of Elementary and Secondary School Districts and Schools in Selected School Districts: School Year 1978–1979*, vol. 11, p. 963 (hereafter cited as *1978–1978 Directory); A Status Report*, pp. 56–57.

[179] *1978–1979 Directory*, p. 1223; *A Status Report*, pp. 60–61.

[180] Findings of Fact and Conclusions of Law, Lidell v. Board of Education, No. 72–100–C(c) (E.D. Mo. June 3, 1980) at 5, as reported in Missouri Advisory Committee to the U.S. Commission on Civil Rights, *School Desegregation in the St. Louis and Kansas City Areas* (January 1981), p. 18 (hereafter cited as *Desegregation in the St. Louis and Kansas City Areas).*

[181] Ibid., see footnote 9, p. 17.

[182] Ibid.

[183] *Washington Post*, Feb. 13, 1981, p. A9.

[184] Ibid.

Department of Justice and the St. Louis Board of Education submitted a plan to the district court for voluntary interdistrict exchange of students.[186] The major component of the plan provides for "students who are members of the racial majority of the student population at a school in any participating district. . .to transfer voluntarily to a school and district in any participating district in which they would be in the racial minority. . . ."[187] The costs for the program, estimated at more than $6 million for the first year, would be borne by the State. A unique feature of the plan provides that "each student who transfers under the plan would receive from the State one-half year of tuition-free education at any Missouri State institution of higher education (in which the student enrolls under normal enrollment criteria) for each year completed in a host district."[188]

A number of concerns and reservations have been expressed about the proposed plan, including whether the State will accept the financial responsibility, especially since the State is experiencing financial problems. The effectiveness of the plan has also been questioned. The Department of Justice estimates that during the first year of the plan approximately 1,550 students would participate in the magnet school program and 2,000 students would transfer from city to suburban schools. The Department of Justice states that it has no basis for its student transfer projections from the suburban to the city schools. However, the history of voluntary transfer plans leads to the conclusion that few white students will transfer to the city schools. Moreover, the involvement of 3,550 students in desegregation would have a minimal effect on a metropolitan system of 250,000 students, which is approximately 25 percent black, and on a city system of 60,000 students, which is 80 percent black.[189]

A metropolitan remedy has also been urged by the school board in the Kansas City, Missouri, desegregation case.[189] In 1978 the Kansas City school system's student population was 63.9 percent black. The city school system enrolled 66.6 percent of the black students in the Kansas City Standard Metropolitan Statistical Area (SMSA). One of the surrounding school districts had a black student population slightly under 7 percent. The remaining 14 districts had student populations under 4 percent black.[190]

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[186] Lidell v. Board of Education, No. 72-100-C(c) (E.D. Mo. June 3, 1980).

[187] *Id.* at 9.

[188] *Id.* at 31. The State of Missouri has submitted a similar plan for voluntary transfer of students among the city and suburban school districts. The State plan, however, does not include the "free tuition provision," and it asks that motions by the St. Louis School Board and the NAACP to include 40 suburban school districts as defendants in the desegregation case be withdrawn. Civil rights and desegregation advocates have expressed concern over the plan, questioning whether it would, in fact, accomplish much desegregation. The plaintiffs in the case continue to push for a trial on the issue of metropolitan-wide violations and hope for a much more substantial remedy. Thus, they view this plan as little more than an interim solution.

[189] *Id.*

[189] *Desegregation in the St. Louis and Kansas City Areas*, pp. 22-23.

[190] Ibid., pp. 7-9.

The history of school segregation in the Kansas City SMSA included the transporting of black students from Missouri suburban districts to Kansas City's black high school.[191] In 1976 an administrative law judge found that the Kansas City school district had not dismantled its dual school system under its 1955 desegregation plan.[192] The judge also found that school boundaries had been drawn to maintain segregation, new schools had been built in locations likely to result in one-race schools, transfer policies of the district had contributed to the racial identifiability of district schools, and one-race schools under the dual system had remained either predominantly white or black in the 20 years since *Brown*.[193] The school district contended that a remedy limited to the school district would result in further segregation of the district.[194] A metropolitan remedy was not found necessary at that time by the administrative judge (December 22, 1976).[195]

In May 1979 an amended complaint was filed in Federal district court calling for the reorganization of 14 Missouri school districts, including Kansas City, on the grounds that their racial composition (predominantly white except for Kansas City) was the consequence of deliberate acts by the Missouri Board of Education and the State government.[196] The Kansas City school district a few months later filed a cross claim charging that the segregated character of the Kansas City district was caused by State action. The district urged the court to "order the State to submit a plan to eliminate all vestiges of the dual segregated school system in the Kansas City metropolitan area."[197] As of June 1981 the suit was pending.[198]

In light of the need for comprehensive interdistrict remedies in many urban areas to desegregate effectively, the results of research on the effects of metropolitan school desegregation on housing desegregation are encouraging. A recent study, although limited in scope, found that cities with metropolitan school desegregation experienced greater reductions in housing segregation than similar cities without such desegregation.[199] Further, metropolitan desegregation was seen to promote stable housing

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[191] Ibid.

[192] Ibid., pp. 22–23. On April 17, 1973, the Office for Civil Rights of the Department of Health, Education, and Welfare notified the school district it was in presumptive noncompliance with Title VI of the Civil Rights Act of 1964. In March 1975 the U.S. District Court for the District of Columbia found that the time for securing voluntary compliance had passed for the Kansas City school district. The court ordered HEW to begin enforcement proceedings within 60 days of its order. A desegregation plan was submitted by the school district on June 23, 1975. It was rejected by HEW on July 14, 1975. The administrative hearing began Dec. 8, 1975, and ended Jan. 16, 1976.

[193] HEW v. Kansas City, Missouri, School District (HEW Administrative Law Case Docket, No. 5–92, Dec. 22, 1976), pp. 67–75, as reported in *Desegregation in the St. Louis and Kansas City Areas*, p. 22.

[194] Ibid., p. 23.

[195] Ibid.

[196] Ibid.

[197] Ibid.

[198] Ibid., p. 24; Malcolm Barnett, U.S. Commission on Civil Rights Regional Office staff, Kansas City, Mo., telephone interview, June 23, 1981.

[199] Diana Pearce, *Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns* (Center for National Policy Review, November 1980).

desegregation, which could limit the need for transporting students to achieve school desegregation.[200] Riverside, California, the sample city with the longest experience with metropolitan desegregation (15 years), now requires busing in only 4 of its 21 elementary schools to achieve racial desegregation.[201]

The Commission believes that if we are to achieve the national goal of desegregation, the Nation must move more rapidly than in the past to develop and implement metropolitan school desegregation remedies. School desegregation on a metropolitan basis offers positive advantages for the education of all children. Metropolitan plans have proved to be quite stable, and the concern over white flight from public education is eliminated because there is simply "no place to flee."[202] Moreover, in addition to racial desegregation, the schools are desegregated across economic lines, as the boundaries that exist between cities and suburbs divide people not only by race but by income. Research has demonstrated that children from disadvantaged backgrounds—black and white—are positively influenced in academic achievement and future aspirations by children of more advantaged backgrounds. The advantaged children in no way suffer.[203]

The drive for consolidation of school districts over the past 40 years has been actuated by a belief that reorganization of school districts into larger units can provide more efficient and economical education. Such efforts are specifically needed in some metropolitan areas where school districts often are extremely unequal in size and overlap lines of political jurisdictions.[204] One effect of consolidation to achieve desegregation would be to eliminate a number of fiscal inequities that exist among districts within a given metropolitan area. Moreover, metropolitan school districts allow for the pooling of resources and the provision of special services for all students—the gifted, the handicapped, the slow learners, and students with special aptitudes. Individual school districts, unless they are extremely large, lack the resources to meet these diverse needs.[205]

The evidence available suggests that the transportation of students required to desegregate on a metropolitan basis would not be extensive. An idea of what transportation needs are involved in metropolitan desegregation can be gleaned from plans already in operation. For example, in Charlotte-Mecklenburg County, North Carolina, a school district of 550

[200] Ibid., pp. 26, 50–51.
[201] Ibid., p. 52. The school district is metropolitan in scope.
[202] U.S., Commission on Civil Rights, *Statement on Metropolitan School Desegregation* (February 1977), pp. 42, 56–57.
[203] Ibid., pp. 58–60; see also U.S., Department of Health, Education and Welfare, *Equality of Educational Opportunity* (1966); U.S., Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967) (hereafter cited as *Racial Isolation in the Public Schools*); Frederick Mosteller and Daniel P. Moynihan, eds., *On Equality of Educational Opportunity* (New York: Vintage Books, 1972).
[204] Ibid., pp. 60–62.
[205] Ibid.

square miles enrolling 84,000 students, the desegregation plan involved a maximum bus ride of 35 minutes. This was an improvement over the situation that prevailed before desegregation, when children were transported an average of 15 miles one way for an average trip of more than 1 hour.[306] The reason metropolitan school desegregation plans in some instances entail modest busing is that city-suburb boundary lines frequently separate schools that are drastically different in racial character, but that are geographically close together.[307]

[306] Ibid., p. 53.
[307] Ibid., pp. 54–55.

Transportation of Students

School desegregation in most districts requires the restructuring of school districts, including changes in school attendance zones and grade levels. This restructuring is accomplished by techniques that include establishing satellite attendance areas, pairing and clustering, establishing magnet schools, building new schools, and closing schools.[208] Restructuring may require the busing of students who were not bused prior to desegregation, but the increase is usually substantially less than is popularly believed. Nationally, slightly more than 50 percent of all school children are bused to school. Within that 50 percent, less than 7 percent are bused for school desegregation purposes.[209] In fact, of the total number of children attending public school, only 3.6 percent are bused for school desegregation purposes.[210] Moreover, because in the South blacks were often transported past "white schools" to schools for blacks, desegregation in many such school districts actually resulted in a decrease in the distance and time involved in student transportation. After desegregation in Tennessee, the number of students transported decreased by 20,048 and the number of miles decreased by 1,910,656 per school year. Similarly, in Georgia the number of students bused increased by 14,434, but the number of miles decreased by 473,662.[211]

[208] U.S., Commission on Civil Rights, *Fulfilling the Letter and Spirit of the Law, Desegregation of the Nation's Public Schools* (August 1976), p. 109 (hereafter cited as *Fulfilling the Letter and Spirit of the Law).*

[209] U.S., Department of Health, Education, and Welfare, National Institute of Education, *Summary of Statistics on School Desegregation Issues* (April 1976), pp. 1–2 (hereafter cited as *Summary of Statistics on School Desegregation Issues);* David Soule, U.S. Department of Transportation, telephone interview, Mar. 12, 1981. Mr. Soule indicated that the percentages have remained the same since 1976.

[210] Ibid. In other words, out of every 100 school children, 50 are bused to school, and fewer than 4 out of every 100 pupils are bused for purposes of school desegregation.

[211] Charles D. Moody and Jeffry D. Ross, "Costs of Implementing Court-Ordered Desegregation," *Breakthrough,* vol. 9, no. 1 (Fall 1980), p. 4 (hereafter cited as *Breakthrough).*

Further, the Supreme Court of the United States resolved the issue of student transportation for purposes of school desegregation a decade ago when it recognized in *Swann* "the importance of bus transportation as a normal and accepted tool of educational policy. . . ."[213] The Court stated that "desegregation plans cannot be limited to the walk-in school"[213] and discussed appropriate limits on transportation, noting that "limits on time of travel will vary with many factors, but probably none more than the age of the students."[214]

The decrease in the number of students involved or in the number of miles may result in a decrease in transportation costs. Data collected by the Commission on 16 desegregated districts show that the percentage of the budget spent on student transportation after desegregation decreased in 3 districts, stayed the same in 2, and increased in 11.[215] The increase was less than 2 percent in all districts. Further, data on student accident rates from the National Safety Council demonstrate that students walking to school are three times more likely to be involved in accidents than those traveling by bus.[216] The additional transportation costs, in many instances, are less than the costly litigation process. Desegregation litigation is typically a lengthy and costly process. It is not unusual for the process to span a decade and encompass 25 reported judicial opinions, costing in excess of a million dollars.[217] Recent examination by the Congress and the Federal courts of who should bear these costs has resulted in imposing the "entire cost of litigation on defendant school districts in cases where the plaintiffs prevail."[218] Plaintiffs have prevailed in virtually all school desegregation cases.[219] Funds spent opposing desegregation more appropriately should have been used to promote desegregated quality education.

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[213] 402 U.S. at 29.
[214] *Id.* at 30.
[215] *Id.* at 31.
[216] *Breakthrough*, p. 5 Data were collected on 29 desegregated districts, but were comparable only for 16.
[217] *Summary of Statistics on School Desegregation Issues*, p. 2.
[218] *Breakthrough*, p. 6.
[219] Ibid.
[220] Ibid; Northcross v. Board of Education of the Memphis City Schools, 611 F.2d 624, 639 (6th Cir. Nov. 23, 1979), *cert. denied*, 100 S. Ct. 2999 (June 9, 1980).

The Effect of Desegregation on Public Education

School desegregation remains to be accomplished in districts across this country. It should take place because it is the law of the land. It cannot be repeated too often that schools segregated through the deliberate choices of government officials are inherently unequal. Although the debate continues as to whether school desegregation improves the quality of education for minorities (there is strong evidence that it does), the fact remains that there is a constitutional prohibition against legally sanctioned segregated school systems. By raising the educational quality issue in isolation and failing to focus on constitutional requirements, the debate addresses the symptom of poor-quality education and not the cause of the problem, racial discrimination. As psychologist William Ryan states in his book *Equality:*

> The argument that school desegregation produces no educational dividends is simply irrelevant. . . .It misses the whole point of desegregation. The purpose is to wipe out the *caste* implications of color. When drinking fountains were desegregated, no one expected the water quality to improve; when lunch counters were desegregated, the hamburgers and Cokes didn't taste any better. . . .And no one expected black kids in desegregated swimming pools to start swimming faster or ministers in desegregated churches to preach more eloquently. Segregation itself unjustly inflicts pain and injury on black people. Desegregation is designed to stop that particular source of hurt; that's a good enough goal.[39]

As the previous discussion has shown, the desegregation of schools has been ordered by the courts or the executive branch of the Federal Government only after being presented with overwhelming evidence of *de jure* segregation. School desegregation is ordered to remedy illegal acts on the part of school and government officials. This is true for all parts of the

[39] William Ryan, *Equality* (New York: Pantheon Books, 1981), p. 159.

Nation. What *Brown* demonstrates is that State-imposed educational separation, in fact, means educational inequality. As measured by all objective criteria, black children segregated from the white majority generally are afforded unequal educational opportunity. They are educated in schools where facilities, curricula, and teaching are inadequate.[221] Resources available to a school and the quality of its staff affect the quality of the education provided and thus future opportunities for minority students.

Although equality of such tangible considerations as school facilities is germane to desegregation and school desegregation does result in the equalizing of resources, just as germane is the issue of intangible qualities. A minority student sitting next to a white student is certainly not guaranteed to learn more, nor is this a prerequisite for academic achievement. However, there is ample evidence that, overall, desegregation enhances the academic achievement of minorities and does not hinder the achievement of whites.[222] The reasons why continue to be debated. Just as in the higher education case of *Sweatt v. Painter,* [223] where the court considered the schools' comparative "standing in the community," the perceptions of minority and majority schools must be considered. Racially segregated schools that minorities attend are often perceived by the community as inferior. Some teachers carry this perception into the schools, and it is passed on to the students.[224] Put simply, there is a perception that less is required of black students in black schools because traditionally less has been expected of them.[225] This acceptance of the view of racially segregated schools as inferior is often held by employers and college admission officers. Thus, it can limit future opportunities for minority students who attended such schools.[226] There are, of course, exceptions. An example is Dunbar High School in Washington, D.C., which was an academically elite, all-black, public high school from 1870–1955.[227] However, the special conditions that contributed to Dunbar's excellence do not lend themselves to replication, nor should the segregated system that led to the creation of Dunbar be reestablished.[228] The school drew its students from the entire black community of Washington, D.C., and a self-selection of highly motivated students occurred because of the school's reputation. Moreover, the school had its choice of potential

[221] U.S., Commission on Civil Rights, *Understanding School Desegregation* (1971), "Integration and Quality Education," unpaginated (hereafter cited as *Understanding School Desegregation).*
[222] *Fulfilling the Letter and Spirit of the Law,* p. 153; Robert L. Crain and Rita E. Mahard, "Desegregation and Black Achievement: A Review of the Research," *Law and Contemporary Problems,* vol. 42, no. 3 (Summer 1978), p. 48 (hereafter cited as *Desegregation and Black Achievement).*
[223] 339 U.S. 629 (1950).
[224] *Racial Isolation in the Public Schools,* vol. 1, p. 193.
[225] *Understanding School Desegregation,* "Integration and Quality Education," unpaginated.
[226] *Racial Isolation in the Public Schools,* p. 204.
[227] Thomas Sowell, "Black Excellence—The Case of Dunbar High School," *The Public Interest,* no. 35 (Spring 1974), p. 3.
[228] Ibid., pp. 20–21.

teachers and principals from blacks with outstanding credentials who were almost completely excluded from opportunities at most colleges and universities and in other employment fields. Such persons were attracted to Dunbar because of its reputation for academic excellence.[229] Although there are undoubtedly some current examples of excellent all-minority schools, the fact remains that there is a constitutional prohibition against legally sanctioned segregated schools. Furthermore, the past has clearly demonstrated that for the vast majority of persons of color separate is inherently unequal.

Quality of Education

The Commission has found that the process of school desegregation and thus the benefits to students are significantly affected by the support or opposition it receives from local leadership, particularly school officials. When that leadership and support are present, many desegregating school districts in providing equality of educational opportunity often simultaneously reevaluate their educational programs and services and, as a result, improve them for all students.[230] In these school districts it is recognized that school desegregation requires more than simply reassigning students and that efforts must be made to create a school and classroom environment that supports, challenges, and accepts all students. Testimony by witnesses at Commission hearings indicates that, as the result of school desegregation, teachers have become more sensitive to the kind of instruction that helps to ensure student interest and academic success, that teachers' expectations of minority students tend to increase, that the academic performance of minority students generally improv s, and that students more often are motivated and thus attend school more regularly.[231]

Further, research evidence clearly demonstrates that school desegregation results in improvements in achievement for minority students and majority-group students hold their own academically. Moreover, not one study has shown a drop in achievement for white students.[232] A recent study that reviewed the findings of numerous studies on the effect of school desegregation on minority students concluded:

> desegregation creates a sudden burst of achievement growth lasting through the early grades of elementary school. At the end of the primary grades, the desegregated students have

[229] Ibid., p. 6.
[230] *Fulfilling the Letter and Spirit of the Law*, p. 112.
[231] Ibid., pp. 112–13.
[232] See, for example, Nancy St. John, *School Desegregation Outcomes for Children* (New York: John Wiley and Sons, 1975); Meyer Weinberg, "The Relationship Between School Desegregation and Academic Achievement: A Review of the Research," *Law and Contemporary Problems*, vol. 39, no. 2 (Spring 1975); and *Desegregation and Black Achievement*.

higher achievement than in segregated schools and over the next few years they maintained this higher level of achievement but do not increase it.[235]

The study also concluded that the age of the students is critical and found that *every* sample of students desegregated at kindergarten showed positive achievement gains.[236] This review also found that desegregation enhances IQ test scores as much as or more than achievement test scores and that metropolitan desegregation plans show stronger achievement effects than those limited to city or suburban districts.[237]

Quality education cannot be measured solely by reference to test scores. The school is the most important public institution bearing on the child's development as an informed, educated person and as a human being. "It is essential that all children—black, brown, red, yellow, and white—receive the kind of training in integrated school environments that will equip them to thrive in the multiracial society of which they are apart."[238] Students, the major actors in the school desegregation process, consistently adjust to school desegregation in a positive manner, in fact, more positively than adults.[239] Students indicate that, even where desegregation proved initially frightening or difficult because of prejudices, it subsequently proved to be a worthwhile experience and an essential part of preparation for life in a multicultural society.[240] School districts that have experienced desegregation for several years generally report that minority student achievement rises and that these increases, coupled with greater motivation, ultimately lead to pursuit of higher education.[239] Majority-group students hold their own academically, and they commonly report that experiences with minority students have dispelled long-held stereotypes.[240] A black student and a white student testifying at a Commission hearing in Boston, Massachusetts, discussed their experiences with school desegregation and one commented:

> the benefits of. . .desegregation are that you are educated alongside every other American child. You are not educated just about yourself, you are educated to what they are, who they are, what they are about, just as they are educated about you. . . .[241]

The other student stated:

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[235] Robert L. Crain and Rita E. Mahard, *Some Policy Implications of the Desegregation Minority Achievement Literature* (Center for the Social Organization of Schools, April 1981), p. 15.
[236] Ibid., p. 10.
[237] Ibid., pp. 20, 26.
[238] Statement of President Nixon as reported in U.S., Commission on Civil Rights, *Understanding School Desegregation* (1971), "Integration and Quality Education," unpaginated.
[239] *Fulfilling the Letter and Spirit of the Law*, p. 136.
[239] Ibid., p. 138.
[240] Ibid., pp. 113, 153.
[240] Ibid., p. 153.
[241] *Hearing Before the United States Commission on Civil Rights, Boston, Massachusetts*, June 16–20, 1975, p. 145.

[One]. . .benefit. . .is that we get to live together with one another. It is not just all whites living with all whites. It is everybody together, all races, colors, creeds, and religions and that is one main benefit I see.[343]

Long-Term Effects

Research indicates that desegregated elementary and secondary education has positive effects on the long-term aspirations of black students and promotes interracial relationships. The Commission as early as 1967 found that both whites and blacks who experienced desegregated schools were more likely to experience desegregated environments later in life. As adults they were more likely to live in desegregated neighborhoods, their children were more likely to attend desegregated schools, and they were more likely to have close friends of the other race than were adults of both races who attended segregated schools.[343] Research also provides evidence that blacks who have experienced desegregation have a more positive outlook on the availability of occupational opportunities, are more confident in interacting and succeeding in interracial situations, and have more access to informal sources of information about employment opportunities. All of these considerations are important for adult occupational success.[344] Recent studies indicate that black students attending desegregated schools have higher levels of educational aspiration and attainment. One study found that northern blacks from predominantly white high schools were nearly twice as likely to complete college as their segregated counterparts.[345] Such students went primarily to traditionally white colleges (7 to 2 ratio) as compared with their counterparts from black high schools, who primarily went to traditionally black colleges, by a 6 to 5 ratio.[346] The authors suggested several hypotheses for their results: (1) White schools may have more favorable academic climates; (2) blacks may respond to contacts with college-bound white peers; and (3) blacks may be influenced by their opportunity to test themselves against whites in a school which has a racial composition like that found in the "real world."[347] Other studies have found that black graduates of desegregated primary and secondary schools have higher occupational aspirations, are more likely to attend traditionally white higher education institutions, and are more likely to be employed than their segregated peers.[348] Further,

[343] Ibid.
[343] *Racial Isolation in the Schools*, pp. 73–144.
[344] Robert Crain and Carol Weisman, *Discrimination, Personality and Achievement* (New York: Seminar Press, 1972), pp. 133–53.
[345] Robert L. Crain and Rita E. Mahard, "School Racial Composition and Black College Attendance and Achievement Test Performance," *Sociology of Education*, vol. 51, no. 2 (1978), pp. 81–101.
[346] Ibid., p. 99.
[347] Ibid.
[348] Jo Mills Braddock, "The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact Hypothesis," *Sociology of Education*, vol. 53, no. 3 (July 1980), pp. 178–86.

research indicates that blacks from desegregated schools experience social mobility to a greater extent than blacks from segregated schools.[249] The author states, "in the job market, whites may constitute the primary competitors for vacant positions and in desegregated schools there is at least a chance for blacks to interact with the people—whites—who constitute the majority of both American society and the labor market."[250] Thus, school desegregation can have an important effect on the adult life of minorities.

[249] William W. Falk, "School Desegregation and the Eductional Attainment Press: Some Results from Texas Schools," *Sociology of Education*, vol. 51, no. 4 (1978), pp. 282–88; Kenneth L. Wilson, "The Effects of Segregation and Class on Black Educational Attainment," *Sociology of Education*, vol. 52 (April 1979), pp. 84–98.

[250] Falk, "School Desegregation," p. 288.

Conclusion

More than a quarter of a century ago the Supreme Court of the United States declared that legally compelled segregation of students by race deprived students of the equal protection of the laws as guaranteed under the 14th amendment of the Constitution of the United States. Accordingly, over the years school desegregation has been ordered to correct constitutional violations and to eradicate their effects. It is the law of the land; it should be accepted, and the debate should end. Although the ruling in *Brown* did not address the quality of the education provided students, there is ample evidence to show that school districts often use the school desegregation process as an opportunity to improve the quality of education provided all students. As social scientists Robert Crain and Rita Mahard have stated:

> Has desegregation resulted in improved achievement for blacks? The answer hardly needs study, since desegregation has resulted in the closing of many inadequate segregated schools in both the North and the South.[351]

They further report that results from a number of desegregation studies reveal a four to one ratio favoring positive outcomes in achievement gains for black students.[352]

School desegregation holds the promise of providing all students an equal chance to learn and develop in a setting that will provide them the necessary skills to be productive citizens and with experiences and the development of attitudes that will stand them in good stead in a multicultural society. School desegregation gives the Nation an opportunity to wipe clean the education slate, to remedy the past injustices of "separate but equal." It requires, however, more than court decisions. All branches of the Federal Government must participate as equal partners.

[351] *Desegregation and Black Achievement*, p. 48.
[352] Ibid.

Commitment and leadership are also needed on the local level from political, community, business, and labor leaders; from school officials, whether board members, teachers, or support staff; and from parents and students. School districts across the country have demonstrated that desegregation can work and can have positive results for all. What is needed is a commitment to make desegregation work and to make equality of educational opportunity a reality for all students.

If, despite the Constitution and the courts, politicians find a way to do away with busing, they will be cheating some children out of something very important: the experience of functioning in an integrated society, which is the kind of society their generation is going to have to live in—that, or "a house divided against itself," which cannot stand.[363]

[363] *Charlotte Observer*, June 29, 1981, p. 14A.

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